In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-62

MICHAEL GENOVESE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the federal immunity statute (18 U.S.C. 6002-6003) violates the doctrine of separation of powers; that it is not coextensive with the Fifth Amendment privilege against self-incrimination; that a grand jury witness cannot be immunized without five days prior notice; and that he did not in fact invoke the privilege against self-incrimination in refusing to answer questions before the grand jury.

On April 16, 1974 petitioner was subpoenaed to appear on April 22, 1974 before a federal grand jury sitting in the Western District of Pennsylvania. A letter accompanying the subpoena, also dated April 16, 1974, apprised him that the government was prepared to seek an order immunizing him in the event that he invoked his Fifth Amendment privilege against self-incrimination. Petitioner filed a motion to quash the subpoena requiring his presence

before the grand jury which was denied. On April 22, 1974, petitioner appeared before the grand jury, but refused to take the oath which the foreman attempted to administer. The district court ordered petitioner to answer the oath in the affirmative which he then did. In response to certain questions put to him before the grand jury, petitioner refused to answer, claiming First, Fourth, Ninth and Tenth Amendment rights. Petitioner also asserted a right to privacy as grounds for his refusal to answer these questions.

On April 23, 1974, petitioner was adjudged in civil contempt and incarcerated until such time as he would purge himself by answering the questions propounded to him (Tr. April 23, 1974, at 8, 13-14). On April 25 petitioner's counsel informed the court that his client desired to purge himself and he was released from incarceration on the following day. The government subpoenaed petitioner to return to the grand jury on May 9.

On that day petitioner appeared before the grand jury and again refused to take the oath. The court instructed him to take the oath and, after consulting with counsel, petitioner answered three questions before the grand jury. In response to the fourth question put to him, petitioner recited the First, Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth Amendments as grounds for his refusal to answer. Petitioner then requested to go before the court before answering further inquiries. In open court the government presented an application (Pet. App. C, 23a) for an order granting petitioner immunity pursuant to 18 U.S.C. 6003 since he had asserted his Fifth Amendment right before the grand jury. The court granted petitioner immunity (Pet. App. C, 28a) and petitioner, through counsel, informed the court that he would not obey the court's order to testify.

The district court found, after a hearing, that petitioner had refused, without just cause, to obey the court's order to testify before the grand jury (Pet. App. B, 15a). The court held petitioner in civil contempt and ordered him incarcerated until he agreed to testify or until the expiration of the term of the grand jury. The court of appeals affirmed *per curiam* (Pet. App. A, 1a).

1. Petitioner contends that the immunity statute, 18 U.S.C. 6002-6003, is unconstitutional because it violates the doctrine of separation of powers, in that the district court has no discretion in dealing with applications for immunity. Specifically, petitioner asserts that a grant of immunity takes away a witness' privilege against self-incrimination and thus the decision to grant immunity should be subject to judicial scrutiny (Pet. 12-13). This contention is without merit.

A grant of immunity removes the privilege against self-incrimination as a basis for a refusal to testify by precluding the use of the compelled testimony in other proceedings, thereby preserving for the witness the benefits of the privilege. So long as the immunity granted is coextensive with the privilege, there is no constitutional violation. The constitutionality of 18 U.S.C. 6002-6003, under which petitioner was granted immunity, was sustained by this Court in *Kastigar* v. *United States,* 406 U.S. 441.

Petitioner nevertheless contends that the immunity statute is not coextensive with the Fifth Amendment's guarantee against self-incrimination since there can be a prosecution for prior perjured testimony based on a compelled truthful answer to the grand jury. This argument ignores this Court's holding in *Kastigar, supra,* 406 U.S. at 460, 462:

> The [Immunity] statute provides a sweeping proscription of any use, direct or indirect, of the compelled testimony and any information * * * .
>
> * * * * *
>
> [T]he immunity provided by 18 U.S.C. §6002 leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege. The immunity therefore is coextensive with the privilege and suffices to supplant it.

While immunity would not protect petitioner from prosecution for perjured testimony before the grand jury, he could not be prosecuted for prior testimony on the basis of truthful answers given to the grand jury. See, *e.g., United States* v. *Alter*, 482 F. 2d 1016 (C.A. 9).

2. Petitioner contends, relying on *In re Grand Jury Investigation*, 317 F. Supp. 792 (E.D. Pa.), that the Federal Rules of Civil Procedure require that a witness be afforded 5 days in which to respond to an application for a grant of immunity (Pet. 16-17). Petitioner contends that the court's denial of his request for 5 days in which to respond deprived him of an opportunity, *inter alia*, to challenge the prosecution's determination that his testimony was "necessary to the public interest" as required by 18 U.S.C. 6003(b)(1).

We submit that the district court decision relied upon by petitioner is incorrect. The district court's role in considering immunity applications is purely ministerial, and specifically, the court cannot review the prosecution's determination that the testimony sought is in the "public interest." See, *e.g., In re Kilgo*, 484 F.2d 1215 (C.A. 4); *In re Grand Jury Investigation*, 486 F. 2d 1013

(C.A. 3). Given the limited role of the district court with respect to immunity applications, and the potential for disruption of grand jury proceedings which would result from a 5 days' notice requirement, we submit that Rule 6, Fed. R. Civ. P., which requires such notice for "[a] written motion," does not apply to immunity applications. This conclusion is supported by the language of Section 6003, which characterizes the application for a grant of immunity as a "request," rather than a motion.

Even assuming that Rule 6 is applicable to immunity applications, the rule provides that the court may shorten the notice requirement and it is the general practice to hold an immunity hearing immediately after a witness refuses to testify. See, *e.g., United States* v. *Fitch*, 472 F.2d 548 (C.A. 9); *In re Russo*, 448 F.2d 369 (C.A. 9).

Finally, we note that petitioner was informed six days prior to his first appearance before the grand jury that the government intended to seek a grant of immunity if he refused to testify. Although petitioner complains he did not have an opportunity adequately to review the application prior to the grant of immunity, he has subsequently had ample opportunity to do so and has not contended that the application was in any way defective.

4. Petitioner's final contention is that he did not utilize the required precise language to invoke his Fifth Amendment privilege against self-incrimination. Petitioner asserts that his invocation of the Fifth Amendment as a basis for his refusal to answer the question "Were you in charge of numbers activity in East Liberty during the 1960's?," was not a refusal "[to testify based] on his privilege against self-incrimination (Pet. 18). As this Court stated in *Quinn* v. *United States*, 349 U.S. 155, 162 "a claim of the privilege does not require any special combin-

ation of words." No ritualistic formula is necessary to invoke the privilege; "even the most feeble attempt to claim a Fifth Amendment privilege must be recognized." *United States* v. *Goodwin*, 470 F.2d 893, 902 (C.A. 5), certiorari denied, 411 U.S. 969.

Moreover, even assuming that petitioner did not invoke the privilege against self-incrimination, the district court properly held him in civil contempt. Since none of the other constitutional provisions invoked by petitioner establish a testimonial privilege, he was obligated to appear and testify before the grand jury. *United States* v. *Calandra*, 414 U.S. 338, 345; *Branzburg* v. *Hayes*, 408 U.S. 665. His recalcitrance was thus punishable as contempt.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.

DOJ-1974-11